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MEMORANDUM TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results in the
2003/2004 Administrative Review of Freshwater Crawfish Tail
Meat from the People's Republic of China

SUMMARY

We have analyzed the case briefs and rebuttal briefs of interested parties in the 2003/2004 administrative review of freshwater crawfish tail meat from the People's Republic of China ("PRC"). As a result of our analysis, we have made certain changes to the preliminary results. See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review, 70 FR 58672, (October 7, 2005) (Preliminary Results). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is a complete list of issues for which we have received comments:

Issues

- Comment 1: Bona Fides Determination for Yancheng Hi-King Agriculture Developing Co., Ltd. ("Hi-King")
- Comment 2: Application of Combination Rate for Hi-King
- Comment 3: Use of Definitive Spanish Import Data

Background

We published the Preliminary Results of the 2003/2004 administrative review in the Federal Register on October 7, 2005, and invited comments from interested parties. The period of review ("POR") for this review is September 1, 2003, through August 31, 2004. We received a case brief from the Crawfish Processors Alliance ("petitioners"), the Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner of Agriculture (collectively, "Domestic Parties"), on November 7, 2005. We also received a rebuttal case brief from Hi-King on

November 14, 2005. We received no case briefs from the three other respondents, Yancheng Yaou Seafood Co., Ltd., China Kingdom International, and Weishan Zhenyu Foodstuff Co., Ltd., all to whom the Department preliminarily applied adverse facts available in the Preliminary Results.¹ On December 7, 2005, we held a public hearing in this review.

Based on the comments summarized below, we have made revisions to the data used for the final results. For further details, please see the analysis and factor valuation memoranda for Hi-King. See “Memorandum From Scot Fullerton to Christopher D. Riker: Analysis Memorandum for Yancheng Hi-King Agriculture Development Co., Ltd.,” dated February 6, 2006. (“Analysis Memo”). This memorandum is on file in Import Administration’s Central Records Unit, room B-099 of the Department of Commerce building.

General Issues

Comment 1: Bona Fides Determination for Hi-King

Petitioners state that the Department must review the bona fides of any sale which it believes may be clearly atypical and where the use of the sale in the Department’s calculation methodology would undermine the fairness of the comparison of foreign and U.S. sales. Petitioners cite to Windmill Int’l Pte. Ltd. v. United States, 193 F. Supp. 2d 1303 (CIT 2002) (“Windmill”), in which the CIT held that the Department has wide discretion to employ a methodology in determining whether sales are unrepresentative, distortive, or non-bona fide.

Petitioners indicate that Hi-King has reported only a single sale of subject merchandise to the United States during the POR, consisting of a small quantity of subject merchandise. Petitioners further note that respondent has made no other sales of subject merchandise prior to or after the POR. Petitioners state that Hi-King indicated at verification that it does not advertise its products or have any brochures, and generates sales only by waiting for customers to contact it. Petitioners contend that the absence of any other U.S. sales by Hi-King indicates that the sale under review was made for purposes of obtaining a low cash deposit rate for future exports rather than for ordinary and legitimate commercial purposes. Similarly, petitioners indicate, Hi-King’s importer also stated that it had not made any other purchases of crawfish tail meat in the previous two years or subsequent to its single purchase from Hi-King during the POR. Petitioners contend that, based on the totality of the circumstances surrounding the sale reported by Hi-King for the POR, such sale is not a bona fide sale, and accordingly, the review of Hi-King should be rescinded.

Hi-King argues that while the Department considers the totality of the circumstances surrounding the sale in question, the CIT and the Department have articulated a variety of specific factors that should be considered in evaluating whether a sale is bona fide and reflects a

¹ On October 20, 2005, Weishan Zhenyu submitted comments on the Department’s verification report for Weishan Zhenyu, dated September 30, 2005. The Department addressed these comments in its “Memorandum from Scot Fullerton to Christopher D. Riker, Freshwater Crawfish Tail Meat from the People’s Republic of China: Weishan Zhenyu Foodstuff Co., Ltd. Submission,” dated February 3, 2006.

commercially reasonable, arm's-length transaction made on a normal commercial basis. These factors, Hi-King states, include the timing of the sale, the sale price and quantity, expenses arising from the transaction, whether the importer resold the merchandise for a profit, whether the sale was executed on an arm's-length basis, overall business practices of the exporter and importer, and the industry as a whole, and whether there existed a credible negotiation process between the parties that demonstrates a seller seeking to maximize revenue and a buyer seeking to minimize cost and risk. Hi-King states that petitioners' arguments do not address the majority of these factors that the Department normally considers.

Hi-King argues that, to the extent that petitioners have challenged the timing of the sale or the quantity of the sale, petitioners have failed to identify any substantial record evidence to support those allegations. Hi-King contends that while petitioners claim that the quantity of Hi-King's sale was extraordinarily small, petitioners have not provided a meaningful benchmark to establish that the quantity was unreasonably small, and have not demonstrated that Hi-King's sale was small compared to the sales quantity of other Chinese respondents, or small compared to Hi-King's sales to other export markets. Hi-King states that petitioners have not identified what range of sales quantities would be reasonable under normal industry practices. In sum, Hi-King contends that petitioner's statement that the quantity of the sale was small is only an assertion, which is not supported by any comparison to record evidence.

Hi-King further argues that the Department has recognized that single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices.² Hi-King states that in an administrative review of paint brushes from the PRC, the Department found that neither the size of a sale nor the number of sales is sufficiently determinative. See Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 65 FR 45753 (July 25, 2000) and accompanying Issues and Decision Memorandum at comment 8. Hi-King also states that in a new shipper review of honey from the PRC, a sale was still found to be *bona fide* even when it consisted of less than one full container, given the totality of the circumstances of the sale. See Notice of Final Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China, 68 FR 62053 (October 31, 2003) and accompanying Issues and Decision Memorandum at comment 1 ("Honey from the PRC").

Hi-King contends that petitioners' arguments focus on the fact that Hi-King did not have any other sales before or after the POR sale, and that the purpose was to obtain a low cash deposit rate for future exports. Hi-King also contends, however, the fact that Hi-King could not find an importer willing to enter into additional sales and pay the high deposit rate should not be considered an unusual or commercially unreasonable circumstance, given the high cash deposit rate applicable to its sales. Hi-King states that the Department has recognized that it is in a buyer's and seller's interests to achieve a low antidumping duty cash deposit rate, and that it

² Hi-King cites to Certain Cut to Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998).

makes good business sense for the importer to pay a relatively higher price on the initial sales in order to ensure lower-priced future sales.³

In sum, Hi-King states that petitioners have identified nothing on the record regarding the totality of circumstances for this sale that would establish that the sale was not bona fide, and the Department should therefore continue to calculate a dumping margin based on Hi-King's single sale.

Department's Position:

We have analyzed all of the information on the record, including information provided by petitioners and Hi-King, with respect to the question of whether the single sale under review constitutes a bona fide sale. We find no basis to conclude that Hi-King's single sale is not bona fide. In determining whether sales are bona fide commercial transactions, the Department examines the totality of the circumstances of the sale in question. If the weight of the evidence indicates that a sale is not typical of a company's normal business practices, the sale is not consistent with good business practices, or "the transaction has been so artificially structured as to be commercially unreasonable," the Department finds that it is not a bona fide commercial transaction and must be excluded from review. See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998).

In determining whether a U.S. sale, in the context of a review, is a bona fide transaction, the Department considers numerous factors, with no single factor being dispositive, in order to assess the totality of the circumstances surrounding the sale in question. As Hi-King has noted, consistent with these principles, the Department considers such factors as (1) the timing of the sale, (2) the sales price and quantity, (3) the expenses arising from the sales transaction, (4) whether the sale was sold to the customer at a loss, and (5) whether the sales transaction between the exporter and customer was executed at arm's length. See American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996 (CIT 2000) (citation omitted); see also, Tianjin Tiancheng Pharmaceutical Co. Ltd. v. United States, 366 F. Supp. 2d 1246, 1250 (CIT 2005). An examination of whether a sale is a bona fide transaction may include a variety of these and other factors, depending upon the unique circumstances of each case.

In examining all of the information on the record in this case, we have determined that the concerns raised by petitioners do not cause us to reject the commercial reasonableness of this single transaction. Assuming that the quantity of the single sale is low, the Department has consistently found that, absent other factors, single sales of a low quantity are not inherently

³ Hi-King cites to Freshwater Crawfish Tail Meat from the PRC; Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439 (January 10, 2003) and accompanying Issues and Decision Memorandum at comment 1. We note that in that case, the Department also indicated that while it may be a rational "business objective" to limit cash deposits, it would still be unreasonable to allow a company to establish a distorted dumping margin based on sales that are artificially constructed for the purpose of obtaining a low cash deposit rate.

commercially unreasonable. See Honey from the PRC at comment 1. In the instant case, no information has been placed on the record to demonstrate that the price of Hi-King's sale was aberrantly high. The fact that Hi-King does not produce a catalog or does not actively seek out U.S. customers does not necessitate a conclusion that any U.S. sale it enters into is not legitimate. Indeed, no other information exists on the record that demonstrates that the transaction under review is not commercially reasonable. Therefore, we find that there is no basis on the record to find that Hi-King's sale to the United States is not bona fide.

Comment 2: Application of Combination Rate for Hi-King

The petitioners request that Hi-King be assigned a cash deposit rate that is limited to subject merchandise exported by Hi-King and produced by Yancheng Seastar Seafood Co., Ltd. (Seastar), its supplier during the POR. The petitioners contend that assigning this type of rate, referred to as a combination rate, is consistent with the Department's practice and policy in antidumping investigations and new shipper reviews. The petitioners cite two Department Policy Bulletins, Combination Rates in New Shipper Reviews, Policy Bulletin 03.2 (March 4, 2003) and Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries, Policy Bulletin 05.01 (April 5, 2005), where the Department is currently assigning duty rates to specific exporter/producer combinations.

Petitioners note that in Import Administration Policy Bulletin 03.2, the Department states that “{o}nce a new shipper review is initiated, and even after it is concluded, an exporter designated as a new shipper may become a conduit for exports from producers not involved in the new shipper review, as such producers typically find it financially advantageous to channel their merchandise through the new shipper.” Id. at 2. Therefore, the petitioners contend, the Department indicated that “{t}he bonding privilege in effect during a new shipper review, along with the prospective cash deposit rate established in that review,” would be limited to the specific exporter/producer combination established in the new shipper review. Id. at 2-3.

In addition, the petitioners argue, in Policy Bulletin 05.01, the Department found that combination rates assigned in non-market economy (“NME”) investigations were needed in order to prevent the circumvention of high cash deposit rates. The petitioners cite the Department's Policy Bulletin 05.01, which states that, “{t}his practice is necessary to prevent the avoidance of payments of antidumping duties by firms shifting exports through exporters with the lowest assigned cash-deposit rates.” In addition, the Department's Policy Bulletin states that, “{o}nly by limiting the application of the separate rate to specific combinations of exporters and one or more producers can the Department prevent the ‘funneling’ of subject merchandise through the exporters with the lowest rates.” Id. at 7.

The petitioners argue that assigning a low cash deposit rate to Hi-King in this administrative review could create a similar situation of companies trying to circumvent higher cash deposit rates by exporting through Hi-King, situations that both of the Department's policy bulletins are trying to prevent in NME investigations and new shipper reviews by assigning combination rates. Therefore, the petitioners argue, the Department should assign a combination rate to

merchandise that is exported by Hi-King and produced by its reviewed supplier, Seastar.

Hi-King argues that it would not be appropriate for the Department to assign a combination rate in this review, because the Department's policy on assigning combination rates does not yet apply to administrative reviews. Hi-King contends that the Department followed fundamental administrative law procedures to give parties sufficient notice and opportunity to comment on the proposed changes of assigning combination rates in investigations involving NME countries, citing Separate Rates and Combination Rates in Antidumping Duty Investigations Involving Non-Market Economy Countries, 70 FR 17233 (April 5, 2005) (Combination Rates in NME Investigations).⁴ Hi-King asserts that the Department stated in this notice that “these changes in practice only apply to investigations, and the Department is continuing to evaluate whether to extend these changes in practice to administrative reviews.” See Combination Rates in NME Investigations. Hi-King argues that the Department would need to go through a formal notice and comment process if it intended to assign combination rates in administrative reviews.

Additionally, Hi-King argues that if the Department decides to assign a combination rate to its merchandise supplied by Seastar, the Department should also apply the rate to Hi-King's other affiliated producer which did not supply merchandise during the POR. Hi-King suggests that a combination rate is not necessary because the Department can capture the data of its affiliated producers through the Department's collapsing provisions, citing 19 CFR § 351.401(f). Hi-King contends that the Department previously has assigned a final calculated rate to all companies in a collapsed entity under certain circumstances, citing Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review, 69 FR 54635 (September 9, 2004) as discussed in the accompanying Issues and Decision Memorandum at Comment 1.

Department's Position:

We disagree with Hi-King that the Department is unable to assign a combination rate in administrative reviews without going through the formal notice and comment period. As set forth under section 351.107(b)(1) of the Department's regulations, “in the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Secretary may establish a ‘combination’ cash deposit rate for each combination of the exporter and its supplying producers.” In the Final Results of Antidumping Duty Administrative Review: Certain In-Shell Raw Pistachios from Iran, 70 FR 7470 (February 14, 2005), the Department assigned a combination rate to the exporter and its supplier of the subject merchandise based on (1) the similarity of exporter's U.S. sale subject to this review and the exporter's U.S. sale in the previous new shipper review in which a combination rate was applied; (2) the exporter's normal business practice of selling pistachios only to the U.S. market; (3) the exporter's ability to source the pistachios it sells from a large pool of suppliers; and (4) high cash deposit rates for other producers subject to the order and a high “all-others”

⁴ See also notices entitled Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries 69 FR 24119 (May 3, 2004), 69 FR 56188 (September 20, 2004), and 69 FR 77722 (December 28, 2004).

rate.

While the Department has exercised its discretion to assign a combination rate to a respondent in an administrative review in a previous proceeding, we find that the circumstances do not warrant doing so here. Unlike the exporter in Pistachios, Hi-King has not previously participated in a new shipper review. In Pistachios, the Department considered the fact that the exporter's normal business practice was to only sell to the U.S. market. In the instant case, however, Hi-King sells to the domestic Chinese market, the U.S. market, and to European markets. While Hi-King may have the ability to source crawfish tail meat from a large pool of PRC suppliers, and other producers are subject to a high "all-others" rate, we do not find that the facts in the instant review are persuasive enough to warrant the issuance of a combination rate to Hi-King and its producer at this time.

Comment 3: Use of Definitive Spanish Import Data

Petitioners state that, in the event that the final results rely on Spanish import statistics to derive a surrogate value for live crawfish, the Department should rely on the definitive data submitted by petitioners on October 27, 2005.

Hi-King did not comment on this issue.

Department's Position:

We agree with petitioners that the final, definitive Spanish import data for whole crawfish are more accurate than the provisional data used for certain months in the Preliminary Results. Accordingly, for the final results, we have used the final Spanish import data to value the whole crawfish input, where applicable. See "Analysis Memo," at 2.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margin in the Federal Register.

AGREE _____ DISAGREE _____

David Spooner
Assistant Secretary
for Import Administration

Date